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## Canada's International Forest Protection Obligations: A Case of Promises Forgotten in British Columbia and Alberta

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# CANADA'S INTERNATIONAL FOREST PROTECTION OBLIGATIONS: A CASE OF PROMISES FORGOTTEN IN BRITISH COLUMBIA AND ALBERTA

PAUL STANTON KIBEL\*

## INTRODUCTION

Western Canada continues to inspire images of pristine, undisturbed wilderness.<sup>1</sup> Perhaps the most dominant of these images is of the forests of British Columbia and Alberta. These forests conjure up magnificent natural scenery. When one envisions British Columbia, one envisions temperate rainforests of western hemlock, red cedar, and Sitka spruce, its lush habitat for kermode bear and grey wolf, and its clear rivers teeming with salmon and steelhead trout come to mind.<sup>2</sup> One thinks of the rugged boreal woodlands of Alberta, with their moose and snowshoe hare, of the geese and loons splashing in tree-lined lakes and sloughs.<sup>3</sup> These places have taken on an almost mythical status, an expression of nature, powerful and untouched.

Though powerful and compelling, the forestlands of Western Canada are quickly becoming myth and little more. The real forest with its trees, inhabitants, rivers, and fish is being clearcut at an alarming rate.<sup>4</sup> Clearcutting, the primary logging method practiced in Western Canada,<sup>5</sup> is the most ecologically destructive logging technique known. It is also the most cost-efficient.<sup>6</sup> Often described as "strip-mining for trees," clearcutting calls for the removal of all trees, plant

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1. John Daniel, *The Canadian Cut*, in *THE ANCIENT FORESTS OF THE PACIFIC NORTHWEST: PROTECTING A VANISHING ECOSYSTEM* 10 (1992) ("We in the United States tend to think of B.C.'s wilds as relatively undisturbed. We are terribly wrong.").

2. Christopher Genovali, *Canada's Forests: An Ecological Holocaust*, S.F. EXAM., Feb. 4, 1993, at A19.

3. Mike Lipske, *Cutting Down Canada*, INTERNATIONAL WILDLIFE, Mar.-Apr. 1994, at 12.

4. Christopher Genovali, *Horror Show: The British Columbia Chain Saw Massacre*, S.F. EXAM., Jan. 20, 1994, at A21.

5. CANADIAN COUNCIL OF FOREST MINISTERS, *SUSTAINABLE FORESTS: A CANADIAN COMMITMENT* 3 (1992) [hereinafter CANADIAN COMMITMENT].

6. Colleen McCrory, *Canada—Brazil of the North*, in *CLEARCUT: THE TRAGEDY OF INDUSTRIALIZED FORESTRY* 237 (Bill Devall ed., 1994).

life, and animal habitat in a given area. All that remains is a wasteland of sticks and tree stumps.<sup>7</sup>

It is difficult to convey the full scope of the destruction caused by clearcutting. Clearcuts currently fragment nearly every commercially viable forested valley in Western Canada.<sup>8</sup> In the coastal rainforests of British Columbia, most of the remaining old-growth tracts are slated to be logged within the next two or three decades.<sup>9</sup> In Alberta, the provincial government has recently authorized clearcut logging on a tract of forestland that is almost the size of Great Britain—some 221,000 square kilometers.<sup>10</sup> Because of Alberta's relatively sparse topsoil and harsh winter climate, forest regeneration may take a century or more, if it occurs at all.<sup>11</sup>

Although the clearcutting in Western Canada is undoubtedly an environmental tragedy of the highest order, it is also something else. It is a violation of international law and a breach of Canada's international commitment to sustainably manage its forests. Through the adoption of provincial and federal environmental laws, and as a signatory to the United Nations' Biodiversity Convention,<sup>12</sup> the United Nations' Statement of Forestry Principles,<sup>13</sup> the United Nations' World Charter for Nature,<sup>14</sup> the Santiago Forest Conservation Statement,<sup>15</sup> and the North American Agreement on Environmental Cooperation,<sup>16</sup> Canada has taken on certain express international obligations.

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7. See Lipske, *supra* note 3, at 12; GREENPEACE INTERNATIONAL, *CLEARCUT SOUND: THE IMPACT OF LOGGING ON THE ENVIRONMENT AND WILDLIFE* 3 (1994).

8. Jim Cooperman, *Cutting Down Canada*, in *CLEARCUT: THE TRAGEDY OF INDUSTRIAL FORESTRY*, *supra* note 6, at 55.

9. See *id.*

10. Joyce Nelson, *Pulp and Propaganda*, THE CANADIAN FORUM, July/Aug. 1994, at 14. Nelson was honored in 1993 by the Canadian Association of Journalists for addressing one of Canada's most under-reported stories. See Stephen Hume, *Facts and Factoids in the Public-Relations War Over B.C. Forests*, VANCOUVER SUN, Aug. 10, 1994, at 15.

11. See Genovali, *supra* note 2, at A19.

12. Convention on Biological Diversity, reprinted in 31 I.L.M. 818 (1992) (entered into force, Dec. 29, 1993) [hereinafter Biodiversity Convention].

13. Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation, and Sustainable Development of All Types of Forests, U.N. Doc. A/CONF.151/26, Annex 3 (1992) [hereinafter Global Forest Principles].

14. *World Charter for Nature*, Adopted by the United Nation's General Assembly, Oct. 28, 1982, G.A. Res. 37/7 (Annex), U.N. GAOR 37th Sess., Supp. No. 51, at 17, U.N. Doc. A/37/51, reprinted in 22 I.L.M. 455 (1983) [hereinafter World Nature Charter].

15. Santiago Statement on Criteria and Indicators for the Conservation and Sustainable Management of Temperate and Boreal Forests (Signed Feb. 3, 1995, by the governments of Australia, Canada, Chile, China, Japan, Mexico, New Zealand, the Republic of Korea, the Russian Federation and the USA). Text of agreement provided by Bill Mankin, Coordinator of the Global Forest Policy Project in Washington, D.C. (on file with PERC) [hereinafter Santiago Statement].

16. North American Agreement on Environmental Cooperation, 32 I.L.M. 1480 (1993) [hereinafter NAAEC].

The clearcutting of British Columbia and Alberta reveals that these pledges have not been put into practice.

While Canada would prefer to frame the issue as one of domestic resource management, this Article will resist and reject such a characterization. In undertaking international forest protection obligations, Canada has acknowledged the global consequences of regional deforestation.<sup>17</sup> Along with global consequences and global obligations comes global scrutiny and global judgment. In this Article, Western Canada's forest policy will be scrutinized and judged and will be found incompatible with accepted international standards of sustainable forestry.

Part I of this Article sets forth Canada's numerous international forest protection obligations. Part II reveals the pattern of forest destruction and provincial government corruption in British Columbia and Alberta. Part III examines why the Canadian federal government has thus far been reluctant to interfere with provincial forest management. The constitutional arguments supporting this "hands-off" policy are assessed and rejected. Therefore, this Article concludes that the Canadian federal government must ultimately be held accountable for provincial violations of international law.

#### I. A PROMISE UNFULFILLED—CANADA'S INTERNATIONAL PLEDGE TO PROTECT ITS FORESTS

Canada's international forest obligations cannot be traced to a single document. Like most international legal duties, Canada's obligation to practice sustainable forestry is a composite of several agreements and materials. These sources include provincial legislation, federal laws and proclamations, multilateral treaties, and international conventions.

Although each of these international legal sources approaches the issue of forest management from a different angle, common underlying principles can be readily identified. Foremost among these principles are: (1) forests should not be logged in a manner exceeding their natural capacity for regeneration;<sup>18</sup> (2) forests shall be managed to maintain ecological balance and sustainable productivity;<sup>19</sup> (3) envi-

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17. See CANADIAN COMMITMENT, *supra* note 5, at 47-48.

The condition of the earth's forests influences the health of the planet and its inhabitants. The role of forests in global carbon, oxygen and climatic cycles extends the environmental importance of forests beyond the boundaries of the nations where they are located. . . . Canadians recognize that their forests, and the way they are managed, are important to the global ecosystem.

*Id.* at 47.

18. The Global Forest Principles Area series of mild, positively phrased suggestion. There is never a mentioning of "should not log beyond capacity." See World Nature Charter, *supra* note 14.

19. See Biodiversity Convention, *supra* note 12; see Global Forest Principles, *supra* note 13; see World Nature Charter, *supra* note 14.

ronmental impact assessment and mitigation are required for projects that are likely to have significant adverse effects on biological diversity;<sup>20</sup> and (4) existing environmental laws should be fully enforced, and environmental standards should not be lowered to attract foreign investment.<sup>21</sup>

The Canadian federal government and the British Columbian and Albertan provincial governments have argued that their current forest policies comply with these international principles.<sup>22</sup> According to these official sources, clearcutting is an "accepted practice,"<sup>23</sup> and is "entirely appropriate from an ecological standpoint for most forest types in Canada."<sup>24</sup> Moreover, these sources assert that Canadian forest policy sets a global standard of "wise stewardship."<sup>25</sup> These contentions, however, are based on dubious and insupportable interpretations of such terms as "sustainable, capacity for regeneration," and "ecological balance." These interpretations have been categorically rejected by experts working in the forest management field.<sup>26</sup>

In sharp contrast to the interpretations promoted by provincial government officials and timber industry spokespeople, the scientific and international community has established standards for sustainable forest practice. These standards emphasize the difference between sustaining the wood and timber supply, and sustaining the forests.<sup>27</sup> As John Gordon, former Dean of the Yale School of Forestry, has noted, "The major change in forestry thinking has been the abandonment of the concept of a stable flow of wood from the land as a universally

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20. See World Nature Charter, *supra* note 14.

21. See NAAEC, *supra* note 16.

22. CANADIAN FOREST SERV., THE STATE OF CANADA'S FORESTS 1993, at 31 (1994) [hereinafter STATE OF CANADA'S FORESTS]. "The international biodiversity convention is compatible with the objectives of Canada's National Forest Strategy." *Id.*

23. See CANADIAN COMMITMENT, *supra* note 5, at 48.

24. *Clearcutting Not As Bad As Critics Claiming*, VICTORIA TIMES-COLONIST, July 23, 1994, at A5.

25. See CANADIAN FOREST SERV., *supra* note 22, at 31.

26. See RESTORATION FORESTRY: AN INTERNATIONAL GUIDE TO SUSTAINABLE FORESTRY PRACTICES (Michael Pilarski ed., 1994). This comprehensive forest management manual contains more than 50 articles from professional foresters, ecologists, and resource planners working in North American, Latin America and Asia; Lee E. Harding, *Threats to Diversity of Forest Ecosystems in British Columbia*, in BIODIVERSITY IN BRITISH COLUMBIA: OUR CHANGING ENVIRONMENT 245, 257 (Lee E. Harding & Emily McCullum eds., 1994) "In lands managed for timber production, clear-cut logging, reforestation, and short rotations convert large tracts of mature or old-growth forests to managed forests, which do not support the same type of ecosystem as naturally disturbed forest. In effect, the natural forest ecosystem in such areas is permanently lost." *Id.*

27. See Reed F. Noss, *Sustainable Forestry or Sustainable Forests?*, in DEFINING SUSTAINABLE FORESTRY 17, 18 (Gregory H. Aplet et al. eds., 1993).

dominant management objective."<sup>28</sup> In place of the stable wood supply concept, with its emphasis on the farming of commercial tree species, sustainable forestry calls for the protection and management of forest ecosystems.<sup>29</sup> These standards for sustainability were also adopted by the United Nations in the Biodiversity Convention: "*Sustainable use* means the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity."<sup>30</sup>

Clearcutting, and the industrial forestry model currently advocated by the British Columbian and Albertan governments, ignores these standards.<sup>31</sup> In short, clearcutting is based on profit, not science. As Chris Maser, forester for twenty years with the U.S. Department of Interior, Bureau of Land Management, explained, "The concept of short-rotation forestry [i.e., clearcutting] is an economic concept and has nothing to do with the biology of forests."<sup>32</sup>

The legislation, proclamations, and treaties discussed below should therefore be read in the context of science, not politics. The relevant environmental terms are not public relations soundbites, subject to the interpretation of the economic interests that dictate government policy. They are objective criteria to be either respected or violated.

#### A. Provincial Legislation

Although the provincial laws of British Columbia and Alberta are domestic laws, they unequivocally have international legal ramifications. First, provincial laws apply not only to Canadian corporations, but foreign corporations that do business in Canada. Second, many foreign non-Canadian countries have enacted, or are considering enacting, trade legislation that hinges on the standards and implementation of domestic Canadian environmental law.<sup>33</sup> An example of such legislation would be an import ban on wood products obtained from ecologically unsustainable sources, such as clearcuts.<sup>34</sup> Lastly, Canada

28. See John C. Gordon, *Ecosystem Management: An Idiosyncratic Overview*, in *DEFINING SUSTAINABLE FORESTRY*, *supra* note 27, at 240, 242.

29. See Alaric Sample et al., *Introduction to DEFINING SUSTAINABLE FORESTRY*, *supra* note 27, at 3, 4.

30. See Biodiversity Convention, *supra* note 12.

31. See Genova, *supra* note 2, at 6-8.

32. See CHRIS MASER, *THE REDESIGNED FOREST* 106 (1988).

33. Hilary N. French, *Costly Tradeoffs: Reconciling Trade and the Environment*, *WORLDWATCH PAPER* #113, Mar. 1993, at 41. "[E]nvironmentalists emphasize the need to selectively use trade-restrictive tools to meet important environmental goals, particularly given the global nature of the economy and the environment. . . . It is common practice for a country to restrict the entry of products that do not meet its domestic environmental, health and safety laws." *Id.*

34. The basis for such trade laws would likely come from the sustainable "certification" programs that have emerged in recent years. These programs urge consumers to purchase timber from sources/sellers that have been "certified" as practicing sustainably forestry. A national law could declare that only "certified" timber can be

has undertaken international obligations to fully enforce existing environmental measures.<sup>35</sup> To determine whether Canada is honoring these international obligations, one must first look to these provincial environmental standards.

In British Columbia, provincial forest management is regulated by the Forest Practices Code, a set of environmental and logging standards developed by the B.C. Ministry of Forests.<sup>36</sup> Two of the Code's guiding principles are "maintaining healthy, diverse, and self-sustaining ecological systems" and ensuring the "long-term health and productivity of forest ecosystems."<sup>37</sup> The section on ecological criteria provides that provincial forest management plans "must be designed to maintain the long-term sustainability of forest ecosystems."<sup>38</sup> According to B.C. Environment Minister Moe Sihota, the Code establishes a "comprehensive set of environmentally sensitive standards based on the principle of ecosystem protection."<sup>39</sup>

The Alberta Environmental Protection and Enhancement Act came into effect on September 1, 1993.<sup>40</sup> Under this Act, the Sustainable Development Council was created to insure that comprehensive environmental impact assessment is undertaken for proposed provincial government decisions likely to adversely impact the environment.<sup>41</sup> The Act expressly lists paper mill and wood processing plants as activities subject to mandatory environmental impact assessment.<sup>42</sup> In Alberta, logging permits and environmental forest management guidelines are issued in connection with, and are part of, the paper mill approval process.<sup>43</sup> These mandatory assessments require oppor-

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imported. For discussion of timber certification programs, see Bob Nixon, *Consumers, Certification and Changing Patterns*, 10 INT'L J. OF ECOFORESTRY 1, 5 (1994) (an interview with Doug Peterson, Director of the Ecoforestry Institute).

35. See NAAEC, *supra* note 16, at 1480.

36. BRITISH COLUMBIA MINISTRY OF ENV'T, LANDS AND PARKS, BRITISH COLUMBIA FOREST PRACTICES CODE: STANDARDS WITH REVISED RULES AND FIELD GUIDE REFERENCES (1994) [hereinafter B.C. Forest Practices Code].

37. See *id.* § 4:1.

38. See *id.* § 8:2, Ecological Basis.

39. BRITISH COLUMBIA MINISTRY OF FORESTS, New Mandatory Standards to Improve B.C.'s Forest Practices (May 30, 1994) (press release on file with the Pac. Env. and Resources Ctr.).

40. S.A. 1992, c.E.-13.3 (sanctioned on June 26, 1992, proclaimed 1993) [Alberta Environmental Protection and Enhancement Act].

41. *Id.*, pt. I, §§ 5-14.

42. Environmental Assessment Regulation, Alta. 111/93 (implementing the Environmental Protection and Enhancement Act). An EIA is required for the "construction, operations or reclamation of [a] pulp, paper, newsprint or recycled fibre mill with a capacity of more than 100 tonnes per day."

43. Telephone Interview with Monique Ross, attorney with the Canadian Institute of Resources Law, Univ. of Calgary, and co-author of ENVIRONMENTAL PROTECTION: ITS IMPLICATIONS FOR THE CANADIAN FOREST SECTOR (1993), (Feb. 14, 1995) [hereinafter Monique Ross Interview].

tunities for public involvement, and identification strategies to mitigate environmental damage.<sup>44</sup>

Moreover, the province initiated the Alberta Forest Conservation Strategy in October of 1993.<sup>45</sup> Under this official provincial plan, Alberta promises to insure "sustainable use of the province's forests."<sup>46</sup>

### B. Federal Legislation and Proclamations

There are two federal Canadian laws that directly impact forest management and ecosystem protection, the 1985 Federal Fisheries Act ("Fisheries Act")<sup>47</sup> and the 1985 Migratory Birds Convention Act ("MBCA").<sup>48</sup> The Fisheries Act prohibits the "deposit of a deleterious substance of any type in water frequented by fish"<sup>49</sup> and empowers the federal Ministry of Fisheries and Oceans to issue permits and establish rules to ensure that this prohibition is enforced.<sup>50</sup> The soil erosion, river siltation and potential damage to fisheries caused by logging places forest management issues clearly within the reach of the Fisheries Act.

The MBCA was enacted to implement the 1916 Migratory Birds Convention, a bilateral agreement between Canada and the United States.<sup>51</sup> Under the Act, the federal Canadian government is required to condition permits for development or resource use to prevent damage to the nests or eggs of migratory bird species.<sup>52</sup> Several migratory birds covered by the MBCA nest in forests currently being logged in British Columbia.<sup>53</sup> Under the Act, the federal Canadian government retains responsibility for ensuring that provincial logging practices do not violate Canada's international obligation to preserve the nesting habitat of these protected birds.

The Canadian federal government has also produced several official documents concerning forest management, the most significant of these being the 1992 national forestry strategy, *Sustainable Forests: A Canadian Commitment* ("Sustainable Forests"), the 1992 *Canada Forest Accord* ("Forest Accord"), and the 1993 *State of Canada's Forests Report* ("Forests Report").<sup>54</sup> *Sustainable Forests* was prepared by the Canadian Council of Forest Ministers (composed of members from

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44. Alberta Act, *supra* note 40, pt. II, Environmental Assessment Process.

45. See STATE OF CANADA'S FORESTS, *supra* note 22.

46. See CANADIAN COMMITMENT, *supra* note 5.

47. R.S.C. 1970, c.F-14 (now R.S.C., 1985, c.F-14) [hereinafter Fisheries Act].

48. R.S.C. 1985, c.M-7 [hereinafter MBCA].

49. See Fisheries Act, *supra* note 47, § 36(3).

50. *Id.* § 36(6).

51. See MBCA, *supra* note 48.

52. *Id.* §§ 6(a), (b).

53. Legal Memorandum to the Natural Resources Defense Council from the Yale Environmental Policy Clinic 7 (Feb. 22, 1995) (on file with the Pac. Envir. and Resources Ctr.) [hereinafter Yale-NRDC Memo].

54. See STATE OF CANADA'S FORESTS, *supra* note 22; Canada Forest Accord (signed Mar. 2, 1992) (on file with PERC); CANADIAN COMMITMENT, *supra* note 5.



each of the provincial governments) in preparation for the 1992 United Nations Conference on Environment and Development in Rio de Janeiro ("UNCED").<sup>55</sup> The *Forest Accord* was a policy statement developed by the Canadian Ministry of Forestry, provincial forestry officials, and representatives of several aboriginal, environmental, industry, and labor groups.<sup>56</sup> The *Forests Report* was prepared by the Canadian Forest Service and submitted to the Canadian Parliament.<sup>57</sup>

In *Sustainable Forests*, the Canadian Council of Forest Ministers maintained that one of its primary objectives is to "practice sustainable forest management."<sup>58</sup> In the following section, entitled "Forest Stewardship," the Council elaborated on this basic pledge:

Practising sustainable forest management involves managing ecosystems to maintain their integrity, productive capacity, resiliency and biodiversity. Maintaining the integrity of forest ecosystems involves sustaining a wide range of ecological processes where plants, animals, micro-organisms, soil, water and air are constantly interacting.<sup>59</sup>

In submitting *Sustainable Forests* to UNCED, Canada made certain representations to the international community. Some of these representations concerned current forest management practices, while other representations concerned forest protection measures to be taken in the near future. The nations gathered at UNCED had a legitimate expectation that these representations were accurate, and that Canada would implement its international forest protection promises.

In its goals section, the *Forest Accord* declares that one of Canada's central policy objectives is "to maintain and enhance the long-term health of our forest ecosystems."<sup>60</sup> The document expressly recognizes the need to maintain "a rich tapestry of forests that sustains a diversity of wildlife" and that "healthy ecosystems are essential to the health of all life on earth."<sup>61</sup> To implement these goals and protect these values, the *Forest Accord* calls for "strengthening the foundations for conserving the natural diversity of our forests."<sup>62</sup>

The *Forests Report*'s first section is entitled "National Forest Strategy." In this section, the Canadian government declares that its "first strategic direction [is] to improve its ability to manage forests as ecosystems."<sup>63</sup> In the introduction of the second section, entitled "Biodiversity," Canada pledges itself to maintaining "a wide range of

55. See CANADIAN COMMITMENT, *supra* note 5, at 3.

56. See Canada Forest Accord, *supra* note 54.

57. See STATE OF CANADA'S FORESTS, *supra* note 22.

58. See CANADIAN COMMITMENT, *supra* note 5, at 9.

59. *Id.* at 11.

60. See Canada Forest Accord, *supra* note 54.

61. *Id.* at Opening sec.

62. *Id.* at Commitment to Action sec.

63. STATE OF CANADA'S FORESTS, *supra* note 22, at 15.

ecosystems, species and subspecies in its forests.”<sup>64</sup> The Biodiversity section of the report closes with the declaration that Canada will endeavor to insure that “forests, farms and other lands are managed in such a way that they can continue to contribute to biodiversity.”<sup>65</sup>

### C. *United Nations' Biodiversity Convention*

In 1992 at UNCED, an agreement was reached on the conservation and sustainable use of the world's biodiversity. Canada was one the first industrialized nations to ratify this international treaty, known as the Convention on Biological Diversity (“Biodiversity Convention”).<sup>66</sup> “The treaty took effect on December 29, 1993, after it was ratified by the minimum [thirty] countries required.”<sup>67</sup>

The Biodiversity Convention sets forth numerous obligations directly effecting forest management policy. Article 8(c) requires that signatory nations “[r]egulate or manage biological resources important for the conservation of biological diversity whether within or outside protected areas, with a view to ensuring their conservation and sustainable use.”<sup>68</sup> Article 8(d) demands that countries “promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings.”<sup>69</sup> Under article 9(b), nations are required to “adopt measures relating to the use of biological resources to avoid or minimize adverse impacts on biological diversity.”<sup>70</sup>

### D. *Statement of Global Forest Principles*

In addition to the Biodiversity Convention, UNCED also resulted in an agreement concerning international forest management. Canada is a signatory to this agreement, known as the Statement of Forest Principles (“SFP”).<sup>71</sup> As one of its guiding principles, the SFP recognizes the vital role that forests play in “maintaining ecological balance,”<sup>72</sup> and calls upon signatories to protect “fragile ecosystems.”<sup>73</sup> To assure that the world's forests are “sustainably managed,”<sup>74</sup> the SFP obligates countries to strengthen “institutions and programs for the management, conservation and sustainable development of forests and forest lands.”<sup>75</sup>

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64. *Id.* at 19.

65. *Id.* at 31.

66. *See id.* at 30.

67. *See id.*

68. Biodiversity Convention, *supra* note 12, art. 8(c).

69. *Id.* art. 8(d).

70. *Id.* art. 9(b).

71. Global Forest Principles, *supra* note 13.

72. *Id.* art. 4.

73. *Id.*

74. *Id.* art. 2(b).

75. *Id.* art. 3(a).

E. *United Nations' World Charter for Nature*

Responding to the environmental consequences of natural resource consumption and degradation, in 1983, the United Nations adopted the World Charter for Nature ("World Charter").<sup>76</sup> The World Charter's introduction calls upon nations to "recognize the urgency of maintaining the stability and quality of nature and of conserving natural resources."<sup>77</sup> It further declares that our common future depends on "the maintenance of essential ecological processes and life support systems, and upon the diversity of life forms, which are jeopardized through excessive exploitation and habitat destruction."<sup>78</sup> In addition to these more aspirational provisions, the World Charter also demands that signatory nations abide by certain principles relating to the use of natural resources.

As a signatory to the World Charter, Canada has pledged itself to honor several principles that concern forest management and protection. First, under article 4, it has agreed not to use natural resources in "such a way as to endanger the integrity of those ecosystems or species with which they coexist."<sup>79</sup> Second, under article 10(a), Canada is prohibited from exploiting living resources "in excess of their natural capacity for regeneration."<sup>80</sup> Lastly, article 11(a) demands that "activities which are likely to cause irreversible damage to nature shall be avoided."<sup>81</sup>

F. *Santiago Forest Conservation Statement*

In February 1995, Canada joined nine other nations in signing the Santiago Statement on Criteria and Indicators for the Conservation and Sustainable Management of Temperate and Boreal Forests.<sup>82</sup> This agreement calls for the "sustainable management of forest ecosystems"<sup>83</sup> and expressly requires signatory nations to ensure the "conservation of biological diversity,"<sup>84</sup> the "maintenance of productive capacity of forest ecosystems,"<sup>85</sup> and the "maintenance of forest ecosystem health and vitality."<sup>86</sup> The Santiago Statement also obliges Canada to "[e]nforce laws, regulations, and guidelines [within Canada's] borders."<sup>87</sup>

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76. World Nature Charter, *supra* note 14.

77. *Id.*

78. *Id.*

79. *Id.* art. 4.

80. *Id.* art. 10(a).

81. *Id.* art. 11(a).

82. See Santiago Statement, *supra* note 15.

83. *Id.* § 1.3.

84. *Id.* § 3.1.

85. *Id.* § 3.2.

86. *Id.* § 3.3.

87. *Id.* § 4.1.

G. *North American Agreement on Environmental Cooperation and North America Free Trade Agreement*

On August 13, 1993, Canada, Mexico, and the United States signed the North American Agreement on Environmental Cooperation ("NAAEC").<sup>88</sup> The NAAEC was the result of concerns over the environmental impact of the then proposed, now adopted, North American Free Trade Agreement ("NAFTA").<sup>89</sup> For this reason, it is often referred to as NAFTA's environmental side agreement.<sup>90</sup>

Among the issues addressed in the NAAEC is the economic lure of countries or regions with minimal environmental requirements. NAAEC proponent's expressed fears that, under NAFTA, industries would be attracted to locales with low environmental standards or weak enforcement.<sup>91</sup> An example would be a government pattern of not enforcing forest management standards designed to protect the environment. To prevent signatories from engaging in such practice, article 5 of the NAAEC requires that each country "effectively enforce its environmental laws and regulations."<sup>92</sup> A new international institution, the North American Commission for Environmental Cooperation, was created to ensure that nations fully implement this provision.<sup>93</sup>

Similar enforcement requirements can also be found in NAFTA. In NAFTA's preamble, signatory nations commit themselves to "strengthening the development and enforcement of environmental laws and regulations."<sup>94</sup> Similarly, article 114 of NAFTA declares that it is inappropriate for countries to encourage investment by relaxing

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88. NAAEC, *supra* note 16, at 1480.

89. North American Free Trade Agreement, *reprinted in* 32 I.L.M. 296 (1993) [hereinafter NAFTA]; see Daniel Magraw & Steve Charnovitz, *NAFTA's Repercussions: Is Green Trade Possible?*, ENVIRONMENT, Mar. 1994, at 16.

90. See Magraw & Charnovitz, *supra* note 89, at 20.

91. *Id.* at 39.

92. NAAEC, *supra* note 16, art. 5. It should be noted that the NAAEC is only directly binding on the Canadian federal government. Because of concerns over impinging on provincial jurisdiction, Canada requested a special NAAEC provision whereby the agreement's obligations were only binding on provincial governments if provincial governments formally accepted its terms. This Article, however, maintains that the Canadian federal government possesses the constitutional authority to actively ensure that provincial governments comply with international environmental agreements. This interpretation suggests that the NAAEC provision does not excuse provincial violations and that Canadian federal government retains the primary responsibility of obtaining compliance with international environmental obligations. This point is addressed *infra* Part III of this Article. For further discussion of this issue, see Howard Mann, *Canadian Environmental Law, Policies and Politics* (Presented to the State Bar of California Conference NAFTA and GATT: *The Impact of International Treaties on Environmental Law and Practice*, Jan. 21, 1995, on file with PERC).

93. See Magraw & Charnovitz, *supra* note 89, at 20, 40.

94. NAFTA, *supra* note 89, pmbl., 32 I.L.M. at 297.

or derogating from domestic health, safety, or environmental measures.<sup>95</sup>

## II. DESTRUCTIVE LOGGING AND PROVINCIAL CORRUPTION—THE B.C. AND ALBERTA EXPERIENCE

The provincial legislation, federal legislation and proclamations, and international agreements tell a pleasant story. According to these provisions, sustainable forestry is being practiced, biodiversity is being preserved, and environmental laws are being enforced. The true story of forest management in Western Canada, however, is quite a different tale.

In British Columbia and Alberta, forest management continues to operate under industrial logging models that have been obsolete and scientifically rejected for decades. Moreover, provincial governments have invested huge sums of public money in the private timber companies they are charged with regulating. In this climate of collusion, corruption, and conflicts of interest, Canada's international forest protection obligations have remained unfulfilled.

### A. *British Columbia*

In British Columbia, one year's cut from boreal and rainforest on public land 68.6 million cubic meters (15 thousand board feet) for 1992-93 is more than twice the harvest from all the national forests in the entire United States.<sup>96</sup> Most of this timber was obtained through a repetitive cycle of clearcut logging and plantation forestry.<sup>97</sup> As one might predict, the ecological impact of this cut rate and method has been predictably devastating.

On Vancouver Island, for instance, less than seventeen percent of forests on flat or near flat terrain remain.<sup>98</sup> Logging activities have therefore moved to steeper slopes "where the environmental damage caused is even more severe."<sup>99</sup> This logging, and the road building associated with it, have caused serious erosion and landslides, with debris and sediment being washed into streams.<sup>100</sup> In turn, this erosion has caused severe damage to important salmon and steelhead trout runs.<sup>101</sup>

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95. *Id.* art. 114.

96. See Lipske, *supra* note 3, at 12.

97. MONOPOLY AND MONOCULTURE OR SOCIAL AND ECOLOGICAL DIVERSITY, WESTERN CANADA WILDERNESS COMMITTEE EDUCATION REPORT 1, 6 (Winter 1993) (on file with PERC).

98. See GREENPEACE INT'L, *supra* note 7, at 7.

99. *Id.*

100. *Id.*

101. *Id.* "In 1992, the Tripp Report, commissioned by the B.C. Ministry of Environment, found that there was widespread stream damage all over Vancouver Island, notably caused by logging steep slopes." *Id.*

A 1994 report by Environment Canada (the federal environmental ministry) documented and criticized the environmental impact of B.C. logging practices.<sup>102</sup> The report warned that caribou and other large mammals were losing critical habitat, and that insects and small animals essential to the health of B.C. forests were being eradicated.<sup>103</sup> Moreover, numerous indigenous bird species, including the white-headed woodpecker, bald eagle, and great blue heron, are currently threatened by B.C. deforestation.<sup>104</sup>

The report also noted the poor health of second-growth trees, which appeared to be more prone to insect infestation and root disease than the old growths they replaced.<sup>105</sup> Clearly, "sustaining the yield of timber is not the same as sustaining the biological productivity of a forest ecosystem."<sup>106</sup>

These criticisms were echoed in a December 1994 study prepared by the Natural Resources Defense Council ("NRDC").<sup>107</sup> The NRDC report detailed B.C.'s failure to incorporate basic environmental considerations into forest management policies, as well as the dangerous degree of implementing discretion accorded to agency officials.<sup>108</sup> According to the study, B.C. currently sets allowable cut at levels that "exceed ecological sustainability"<sup>109</sup> and "steep slope cutting practices have allowed such substantial soil erosion that regeneration may be impossible in some areas."<sup>110</sup>

B.C.'s disregard of provincial, as well international, forest law is not a consequence of inadequate enforcement resources. Rather, it is consequence of political collusion and conflicts of interest. In April of 1993, the B.C. government purchased \$50 million of stock in MacMillan Bloedel, the largest logging company operating in B.C.<sup>111</sup> This purchase was made just weeks before the B.C. government granted

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102. Margaret Munro, *Report Finds B.C. Life Under Assault*, TORONTO STAR, Apr. 16, 1994, at B6.

103. *Id.*

104. See Harding, *supra* note 26, at 251-55.

105. See Munro, *supra* note 102.

106. See Harding, *supra* note 26, at 259.

107. Mark J. Spalding, *Trade and the Environment: The British Columbian Timber Trade Example* (Dec. 1994) (unpublished paper for NRDC's International Program on file at the Pacific Environment and Resources Center).

108. *Id.* at 1-3. "Virtually all of British Columbia's timber is harvested by clear-cutting ancient forests in a highly unsustainable fashion." *Id.* at 3. "The actual AAC [allowable annual cut] is a judgment of the province's chief forester. . . . [B]ased upon [the] cutting practices harm to fisheries and forest vistas, the province's chief forester is not really considering other resource values such as recreation, tourism and fishing." *Id.* at 8-9.

109. *Id.* at 8.

110. *Id.* at 10.

111. See Joyce Nelson, *Taxpayers Stunningly Generous to Forest Firms*, VICTORIA TIMES-COLONIST, Oct. 13, 1993, at A5. In 1994, as a result of public pressure, the B.C. government sold its shares in MacMillan Bloedel.

MacMillan Bloedel a huge logging concession on Vancouver Island's Clayoquot Sound.

Additionally, MacMillan Bloedel, along with other Western Canadian timber corporations, recently formed the B.C. Forestry Alliance, a public relations group whose purpose is to promote the industry's environmental image worldwide.<sup>112</sup> This group helped finance B.C. Premiere Michael Harcourt's recent visits to the U.S. and Germany, where he sought to dispel the international criticism of B.C. logging practices.<sup>113</sup> As B.C. journalist Joyce Nelson, who was recently honored by the Canadian National Association of Journalists, reported, "[q]uite literally, we are paying a few private companies to cut down our Crown forests and pocket the profits, leaving us with nothing but clearcuts and higher taxes. As if that weren't enough, our governments are adding insult to injury by paying for pro-industry propaganda campaigns abroad."<sup>114</sup>

### B. Alberta

In Alberta, twenty-three percent of the province is currently under lease for eventual logging.<sup>115</sup> These leased areas represent ninety-seven percent of Alberta's coniferous forests, and seventy-seven percent of its deciduous timber.<sup>116</sup> These logging rights have been granted to private timber companies in the form of Forest Management Agreements ("FMAs").<sup>117</sup> Although the Alberta Environmental and Protection Act maintains that government policies will preserve the "integrity of ecosystems"<sup>118</sup> and ensure that "the use of resources and the environment today does not impair prospects for their use in the future,"<sup>119</sup> there are no mandatory FMA guidelines to implement these promises.<sup>120</sup> FMAs need not include provisions for parks, fish and wildlife habitat, old-growth forest, biological diversity, or watershed management.<sup>121</sup> In fact, if set-asides for uses other than

112. See Joyce Nelson, *How the Backroom Boys Greenwash Forest Industry*, VICTORIA TIMES-COLONIST, May 25, 1993, at A5.

113. See Hume, *supra* note 10; see also Derek Denniston, *The Temperate Rainforest: Canada's Clearcut Secret*, WORLDWATCH, July/Aug. 1993, at 9 ("[T]he federal Forestry Minister announced a \$5 million publicity budget for burnishing the timber industry's image with European consumers, adding to the \$1.2 million B.C. Premier Michael Harcourt spent last year.")

114. Nelson, *supra* note 10, at 14.

115. See Lipske, *supra* note 3, at 12.

116. *Id.* at 14-15.

117. See John McInnis, Environmental Research and Studies Centre, Japanese Investment in Alberta's Taiga Forest (on file with PERC) [hereinafter *Alberta's Forests*].

118. Alberta Act, *supra* note 40, at 2a.

119. *Id.* at 2c.

120. See Cooperman, *supra* note 8, at 57.

121. *Id.*

timber harvest exceed more than three percent of the FMA, the Alberta government will compensate private timber companies.<sup>122</sup>

According to one the leading experts on Albertan forestry law, the current FMA system provides an unacceptable degree of discretion to provincial agency officials.<sup>123</sup> Under the Alberta Forests Act,<sup>124</sup> there are no substantive statutory standards to ensure that FMAs adequately protect ecosystems and environmental values.<sup>125</sup>

Moreover, while FMAs are issued at the same time paper mill plans are approved, the Albertan government has determined that, for purposes of the environmental assessment requirements under the Alberta Environmental Protection and Enhancement Act, mill operation and forest management are to be treated as distinct and unrelated activities. Thus, while mill construction and operation are subject to mandatory environmental assessment, the logging practices that provide the mill with wood are not.<sup>126</sup>

The Albertan environment has suffered greatly under the FMA program. The forests of Alberta are home to numerous species of rare wildlife, such as lynx, loons, and boreal owls.<sup>127</sup> Yet, as Mike Sawyer, a Calgary-based ecologist, observed, "these areas are routinely made available for industrial use with predictable and often profound degradation of habitat."<sup>128</sup> Studies have also indicated damage to watersheds, as well as increased soil erosion.<sup>129</sup> Because Alberta's forests are composed of thin soils and mostly slow-growing trees, such as Aspen, the logging and habitat loss will have severe long-term effects.<sup>130</sup> Whether clearcut regions will ever recover biologically is questionable.

The latest, and perhaps most disturbing, chapter in Albertan forest mismanagement is the recent FMAs negotiated with AL-PAC, a Mitsubishi controlled logging and paper company. In 1989, Alberta granted AL-PAC (as well as other multinational logging companies) the right to cut a tract of timberland totalling 221,000 square kilometers, an area twice the size of Belgium<sup>131</sup> and almost as large as Great Britain.<sup>132</sup> These FMAs were negotiated to provide wood for a series of new paper mills and chopstick factories on the scenic Athabasca

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122. *Id.*

123. Interview with Monique Ross, *supra* note 43.

124. *Id.*

125. *Id.*

126. *Id.* See *supra* text accompanying notes 117-22.

127. Lipske, *supra* note 3, at 12.

128. See Mike Sawyer, *Protected Area Strategies: Will They Accomplish Their Objectives?*, ROCKY MTN. NEWS, Winter 1994, at 10-11.

129. See Cooperman, *supra* note 8.

130. *Id.*

131. Lipske, *supra* note 3, at 12.

132. Nelson, *supra* note 10, at 14.



River.<sup>133</sup> Although an official panel recommended that the project be halted until the probable environmental damage could be assessed, its recommendation was disregarded.<sup>134</sup>

As with British Columbia, Alberta's unsustainable forest management policies can be attributed largely to ties between the timber industry and the provincial government. To lure AL-PAC and the other logging multinationals to Alberta, the provincial government extended a \$300 million loan, and pledged over \$75 million in infrastructure improvements.<sup>135</sup> With this much money invested in the project, there is little wonder why environmental protections have gone unenforced, and ecological warnings have been overlooked.

### III. THE NEED FOR FEDERAL ACTION

To its credit, the Canadian federal government has criticized forest management practices in British Columbia and Alberta. Canadian Prime Minister Jean Chretien, has even gone so far as to make a personal pledge to protect British Columbia's most threatened forestlands, in Clayoquot Sound.<sup>136</sup> Yet, despite these criticisms and pledges, Ottawa has not sought to directly interfere with provincial policies. Its position on the issue was stated clearly in *The State of Canada's Forests 1993*, a report published by the federal forest service: "Forest management is a matter of provincial jurisdiction. Each province and territory has its own set of legislation, policies and regulations to govern the management of its forests."<sup>137</sup>

As a result of this position, the Canadian federal government has refrained from applying federal environmental law, federal forest policy, or international forest management agreements to provincial logging. According to a February 1995 study undertaken by the Yale Environmental Policy Clinic, the Fisheries Act permit requirement has not been extended to logging plans on non-federal land.<sup>138</sup> Similarly, the Vancouver-based Sierra Legal Defense Fund reports that the MBCA is not being used to curtail the destruction of migratory birds' nesting sites in British Columbia.<sup>139</sup> In the absence of provincial im-

133. See Genovali, *supra* note 2. "The ghastliest scenario in this looming ecological holocaust will be played out in Alberta, where 13 pulp mills worth \$4.5 billion are set to eventually devour over 220,000 square kilometers of public land." *Id.*

134. Lipske, *supra* note 3, at 15.

135. See Andrew Nikiforuk & Ed Struzik, *The Great Forest Sell-Off*, REPORT ON BUS. MAG., Nov. 1989, at 56, 61; Alberta's Forests, *supra* note 117. "The province of Alberta paid infrastructure costs of \$75 million. Our gov[ernment] also financed mill construction with a \$275 million subordinate income debenture and a \$125 million standby debenture for future expansion. The income debenture does not have to be repaid unless and until the mill is profitable."

136. Interview with Christopher Genovali, Director of the Canadian Forests Protection Project (Dec. 4, 1994).

137. STATE OF CANADA'S FORESTS, *supra* note 22, at 8.

138. See Yale-NRDC Memo, *supra* note 53, at 6.

139. *Id.* at 7.

plementing legislation, Ottawa has also failed to mandate provincial compliance with international forest protection agreements.<sup>140</sup>

Although Ottawa's reluctance to interfere can be attributed in part to the timber industry's economic and political clout,<sup>141</sup> there are also constitutional considerations underlying its current position.<sup>142</sup> Under the Canadian Constitution, powers are divided between the federal and provincial government.<sup>143</sup> Unlike the division of powers between the federal government and the states set forth in the U.S. Constitution, the Canadian Constitution designates powers as exclusively federal or exclusively provincial.<sup>144</sup> Textually, Canadian federalism does not allow for concurrent areas of legislation or regulation.<sup>145</sup>

While these black and white distinctions sound plausible enough on paper, they have proven extremely difficult in practice, particularly in the environmental conservation field.<sup>146</sup> This is because many environmental issues are inherently multidimensional and often implicate a number of sub-issues, such as human health, agriculture, natural resource management, commerce, labor, national security, and foreign relations.<sup>147</sup> This range of implicated issues has led to provincial and federal conflicts over jurisdiction and regulation.<sup>148</sup>

The issue of forest management in the context of international obligations is an example of this constitutional tension. Under section 94 of the Canadian Constitution, provinces are given exclusive power over property rights.<sup>149</sup> Canadian case law has interpreted property rights very broadly to include issues of land-use and natural resources management.<sup>150</sup> This broad definition, which would appear to include

140. See Draft Memorandum of Law from Joan Russow, Lecturer in International Environmental Policy at the University of Victoria, B.C., at 1, 12, 18 (on file with PERC).

141. See CANADIAN COMMITMENT, *supra* note 5, at 27. "Canada's forest industries represent one of our country's largest economic sectors." *Id.*

142. See Judith B. Hanebury, *Environmental Impact Assessment in the Canadian Federal System*, 36 MCGILL L.J. 962 (1991).

143. See Can. Const. (Constitution Act, 1982).

144. See Rodney Northey, *Federalism and Comprehensive Environmental Reform: Seeing Beyond the Murky Medium*, 29 OSGOODE HALL L.J. 127, 128 (1991) "Canadian environmentalists have not yet appreciated how the Canadian constitution has limited environmental reform."

145. *Id.* at 150. "Areas within provincial powers do not have federal counterparts and vice-versa." *Id.*

146. See Hanebury, *supra* note 142, at 965.

147. See MONIQUE ROSS & J. OWEN SAUNDERS, ENVIRONMENTAL PROTECTION: ITS IMPLICATIONS FOR THE CANADIAN FOREST SECTOR 4 (Canadian Inst. of Resources Law, 1993) "The problem in assessing the federal-provincial division of powers under the *Constitution Act* is that neither environmental concerns nor natural resources management are divided neatly between the two levels of government." *Id.*

148. See Hanebury, *supra* note 142, at 1003-04.

149. Can. Const. (Constitution Act, 1982), § 94.

150. See WILLIAM R. LEDERMAN, THE COURTS AND THE CANADIAN CONSTITUTION 192 (1964).

forest management, has resulted in what one commentator called "the continuing resilience of a strongly regionalized form of federalism."<sup>151</sup>

Under section 91 of the Canadian Constitution, however, the federal government is given exclusive authority over "trade and commerce" as well as general power to insure "peace, order and good government" (commonly referred to as "POGG").<sup>152</sup> The Supreme Court of Canada has interpreted the POGG power to include matters of "national concern."<sup>153</sup> Moreover, section 132 provides the federal government with the power to directly implement international treaties concerning "trade and commerce" and POGG interests.<sup>154</sup> The fulfillment of international environmental obligations would appear to fall within these enumerated federal powers. According to Toby Vigod of the Canadian Environmental Law Association, these constitutional provisions provide the federal government with "clear authority to take a strong role in environmental protection."<sup>155</sup>

When applied to the implementation of international forest management agreements, sections 94 and 91 therefore point to different constitutional conclusions. One conclusion is that because forest management concerns property and natural resources, it falls under provincial jurisdiction. The other conclusion is that because forest management concerns trade and commerce and is mandated by international agreements of national concern, it falls under federal jurisdiction.

The Canadian federal government has so far adopted the position that, under the Canadian Constitution, its hands are tied.<sup>156</sup> This position was demonstrated most clearly in the NAAEC negotiations, when a special annex was created to enable the provincial governments to sign on to the agreement independent of the federal Canadian government.<sup>157</sup> This annex provided Ottawa with a short-term

151. See STATE OF CANADA'S FORESTS, *supra* note 22; Richard Cullen, *The Encounter Between Natural Resources and Federalism in Canada and Australia*, 24 U. BRIT. COLUM. L. REV. 275 (1990).

152. Can. Const. (Constitution Act, 1982), § 91.

153. *Regina v. Crown Zellerbach*, 3 C.E.L.R. (N.S.) 1 (S.C.C.), at 32 [hereinafter *Crown Zellerbach*].

154. Can. Const. (Constitution Act, 1982), § 132.

155. Daphne Porter, *The Canadian Environmental Protection Act: Analysis of the Constitutional Deadlock Created by the Equivalency Provisions*, 19 (Apr. 30, 1992) (unpublished 1992 manuscript on file at the Pac. Env. and Resources Ctr.).

156. See STATE OF CANADA'S FORESTS, *supra* note 22; see ROSS & SAUNDERS, *supra* note 147, at 4. "[O]ne fundamental thread that has run through the fabric of this approach to the Constitution should be noted: that is the clear tendency of the federal government to defer to the provinces in matters affecting the management of natural resources." *Id.*

157. See NAAEC, *supra* note 16, Annex 41, § 5. "No other part may request a Council meeting under Article 23 or request the establishment of a panel or joining as a complaining party under Article 24 concerning whether there has been a persistent failure to effectively enforce an environmental law of a province unless that province

means of avoiding direct provincial-federal conflict over adoption of the NAAEC.

The current federal position on the the issue of forest management, however, has been challenged by Canadian constitutional law scholars and the Canadian Supreme Court. These challenges cast considerable doubt on the legal effect of the NAAEC's special annex. They also raise a more fundamental question: should the federal Canadian government be excused from compliance in areas in which it is constitutionally competent to regulate?

In his 1991 Article, *Federalism and Comprehensive Environmental Reform: Seeing Beyond the Murky Medium*, Rodney Northey considered the application of the Canadian *paramountcy* doctrine to federal regulation in the environmental field.<sup>158</sup> Like the *supremacy* doctrine in U.S. jurisprudence, the Canadian *paramountcy* doctrine holds that when provincial and federal laws conflict, the federal legislation will prevail.<sup>159</sup> This doctrine provides the federal government with constitutional authority to take a more active role in provincial natural resource management.<sup>160</sup>

The Supreme Court of Canada reached similar conclusions in the 1988 case of *Regina v. Crown Zellerbach*<sup>161</sup> and the 1992 case of *Friends of the Oldman River Society v. Canada*.<sup>162</sup> In *Crown Zellerbach*, the Court considered the constitutionality of the federal Ocean Dumping Control Act.<sup>163</sup> In upholding the Act, the Court determined that several considerations tilted the balance in favor of the federal government. First, the problem addressed had "extraterritorial" effects that went beyond provincial borders.<sup>164</sup> Second, federal efforts were necessary because the provinces were unable to enact similar effective reforms.<sup>165</sup> Lastly, the Court pointed out that, over time, issues can migrate from provincial to federal jurisdiction.<sup>166</sup> Classes of subject matter that were originally allocated to the provinces may evolve into matters of national and international concern.<sup>167</sup>

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is included in the declaration made under paragraph 1 and the requirements of subparagraphs 4(b) and (c) have been met."

158. Northey, *supra* note 144, at 172-74.

159. *Id.* "In a case of conflict, the *paramountcy* doctrine in Canada asserts that the valid federal legislation is paramount." *Id.*

160. *Id.* at 172. Northey cited the Canadian Supreme Court decision in *Bank of Montreal v. Hill* (1 S.C.R. 121 (1990)) to support this position. In *Bank of Montreal v. Hill*, the court denied the application of provincial law where it conflicted with the purposes of federal legislation:

161. *Crown Zellerbach*, *supra* note 153.

162. (1992) 7 S.C.R. (N.S.) 1; (1992) 88 D.L.R. (4th) 1; (1992) 2 W.W.R. 193 (S.C.C.).

163. See Northey, *supra* note 144, at 142.

164. *Crown Zellerbach*, *supra* note 153, at 35-37.

165. *Id.* at 34.

166. See Northey, *supra* note 144, at 141.

167. *Id.*

In *Oldman River*, the Supreme Court considered whether the federal government could mandate environmental assessment and mitigation for a dam being proposed and funded by a provincial government.<sup>168</sup> The Alberta government argued that "the federal government was incompetent to deal with the environmental effects of "provincial works."<sup>169</sup> The Court rejected Alberta's positions, stating that "although local projects will generally fall within provincial responsibility, federal participation will be required if the project impinges on an area of federal jurisdiction."<sup>170</sup>

These holdings directly bear on the current debate surrounding the implementation of international forest protection agreements. Under the *Crown Zellerbach* standards, federal environmental regulation is permissible when (1) provincial governments have failed to implement necessary reforms, and (2) an issue has changed from one of provincial management to one of "national concern." Under the *Oldman River* standard, federal environmental regulation is constitutional as long as an area of established federal jurisdiction is implicated.<sup>171</sup> Because Canadian compliance with international agreements is a matter of national concern and, at least in the case of NAFTA and the NAAEC, falls within federal trade and commerce jurisdiction, these decisions suggest that the real obstacle to federal action may not be the Canadian Constitution but rather a lack of political will. As a 1993 study by the Canadian Institute of Resources Law ("CIRL") in Calgary concluded: "The potential scope of the decision is very broad, especially given the increasingly international focus of environmental problems. . . . If the courts were to extend the rationale of *Crown Zellerbach* to other areas of international environmental concern, then there is the potential for an increased—or at least different—federal role in environmental management of forests."<sup>172</sup>

Recent legal developments in other Canadian natural resource fields support the conclusion of the CIRL study. In the cases of fisheries and agriculture, constitutional conflicts over environmental jurisdiction have been resolved through what Canadian legal scholars call "cooperative federalism."<sup>173</sup> Under this approach, Ottawa uses political and fiscal pressures to bring provincial practices in line with federal laws.<sup>174</sup> In practice, cooperative federalism has enabled the federal Canadian government to make significant jurisdictional inroads into areas that were previously provincial.<sup>175</sup> These developments suggest that Canada has been moving increasingly towards a *de*

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168. See ROSS & SAUNDERS, *supra* note 147, at 111.

169. *Id.*

170. *Id.*

171. See HANEbury, *supra* note 142, at 976-77.

172. ROSS & SAUNDERS, *supra* note 147, at 10.

173. Monique ROSS Interview, *supra* note 43.

174. See Northey, *supra* note 144 at 162-79.

175. ROSS & SAUNDERS, *supra* note 147, at 4, which states:

*facto*, if not a *de jure*, policy of concurrent jurisdiction in the environmental field.

In light of the paramountcy doctrine's potential applications, the *Crown Zellerbach* and *Oldman River* decisions, and the opportunities presented by cooperative federalism, the Canadian federal government should reconsider its current position. While the loss of international credibility and the degradation of the global environment provide enough motivation to provoke this reassessment, there is now an additional reason for Ottawa to intervene. As a result of lobbying by international conservation groups, corporate consumers of B.C. timber and wood products are cancelling their orders.<sup>176</sup> In Great Britain, for instance, Scott Ltd. recently cancelled a \$5.4 million contract with MacMillan Bloedel.<sup>177</sup> Several newspapers, such as *The New York Times*, and phone book publishers, such as GTE in California, are also considering changing sources.<sup>178</sup> These international developments should serve as a wake-up call to Ottawa. Like it or not, the clearcut of Western Canada is no longer an issue of simply domestic concern.<sup>179</sup>

Though slow to respond, the Canadian federal government has stated to acknowledge the international implications of provincial resource policies. In November 1994, Environment Minister Shelia Copps announced that she will be forwarding a federal endangered

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One must therefore look to a number of heads of federal and provincial authority in order to evaluate the environmental powers of the respective level of government. But even this exercise can be misleading; what it yields is a view of the "legal" constitution, rather than the "political" constitution. That is to say that the two levels of government, through a range of formal and informal agreements, have reached a series of understanding which have radically transformed how the "legal" constitution is implemented in fact. This cooperative federalism . . . has particular relevance to environmental law and policy, given that many environmental concerns have both a federal and provincial aspect.

176. See STATE OF CANADA'S FORESTS, *supra* note 22, at 14. The Canadian Forest Service has indicated:

In December, four German publishers states that they would not buy paper produced from clearcut forests as soon as alternative sources of paper of the same price and quality become available. That declaration and a campaign by Greenpeace, which criticizes Canada's forest management practices, have resulted in the cancellation of two contracts for Canadian pulp. All indications are that the campaign will continue to escalate, with efforts focused on discrediting clearcutting.

177. Neville Nankivell, *Alliance Ready for Gloves-Off Fight With Greenpeace*, THE FIN. POST, Mar. 29, 1994, at 15.

178. Western Canada Wilderness Committee (Nov. 1994) (press release on file with PERC).

179. Mary L. Barker & Dietrich Soye, *Think Locally, Act Globally? The Transnationalization of Canadian Resource-Use Conflicts*, 36 ENVIRONMENT 12 (June 1994). Indeed, "The use of information campaigns at home and abroad can make the proponents more willing to listen and compromise because of real or perceived pressure."

species act to the Canadian parliament in the spring of 1995.<sup>180</sup> Environmentalists are hopeful that this new law will provide a means to curtail provincial forest mismanagement.<sup>181</sup> It remains to be seen, however, if Minister Copps and Ottawa are willing to meet provincial opposition head-on. Will the new law provide the federal Canadian government with the means to ensure compliance with international obligations, or will it once again defer most substantive environmental and natural resource management determinations to the provinces? Legislation that is rhetorically strong but substantively weak may provide Ottawa with nice public relations material. It is unlikely, however, to end Canada's continuing violation of international forest protection agreements.

#### CONCLUSION

As Ottawa considers what course to take, it might be useful to consider the following hypothetical question. What if the State of New York announced that it had no intention to abide by U.S. obligations under NAFTA? Most likely, Canada would demand that the U.S. federal government intervene. Confronted with British Columbian and Albertan violations of international environmental law, the international community must make this same demand. For the sake of the global environment, and for the sake of its own international credibility, Canada must put its house in order.

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180. Western Canada Wilderness Committee, Promise of Tough Endangered Species Protection and Federal Legislation Lauded (Nov. 18, 1994) (press release on file with PERC).

181. *Id.*